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79-1858

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

OSBAN CASTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Osban Caston petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is dated April 24, 1980 and is reported as *U.S.* v. *Caston,* 615 F.2d 1111 (CA 5, 1980). The decision below is appended as Group Appendix A, *infra.*

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 24, 1980. A petition for rehearing was contemplated, but the petitioner has now eschewed the opportunity to file same. Rather, the petitioner seeks redress directly to this Court. This petition is filed within thirty (30) days of April 24, 1980 and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is it not exceptionally important within the realm of Federal criminal justice to ascertain the parameters of Rule 11 compliance where over 85 percent of all criminal convictions occur upon the taking of either pleas of guilty or *nolo contendere*? Assuming this proposition to be correct, do not the decisions in both *McCarthy* v. *U.S.*,[1] and *U.S.* v. *Timmreck*,[2] compel vacation of the guilty plea and sentence imposed on petitioner in this case where the Court of Appeals agreed that there was a paucity of Rule 11 compliance?

2. Whether the Court of Appeals approved constitutional error while affirming petitioner's thirty (30) year sentence for car theft where the sentence was the result of impermissible pyramiding or stacking of counts . . . in violation of petitioner's Fifth Amendment protections?

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1 394 U.S. 459, 89 S.Ct. 1166 (1969).

2 441 U.S. ..., 99 S.Ct. 2085 (1979).

CONSTITUTIONAL PROVISIONS, FEDERAL RULES AND STATUTES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

RULE 11. Pleas

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally, in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a

view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for the dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the

record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty later withdrawn, a plea of nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall

be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant the inquiry into the voluntariness of the plea ncluding any plea agreement, and the inquiry into the accuracy of a guilty plea.

§2 Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (As amended Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.)

* * * * *

§2312. Transportation of stolen vehicles.

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§2313. Sale or receipt of stolen vehicles.

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money,

of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

* * * * *

STATEMENT

Our guilty pleading petitioner is a spectacularly unsuccessful car thief. In this era of fuel shortage(s) and the OPEC countries continually raising fuel prices, our petitioner was not appropriating economy cars. Rather, as the record below reflects, the petitioner saw fit to appropriate Cadillacs, Lincolns, and Chevrolet Corvettes. The government, always obedient to the cause, returned multiple count indictments, both in Atlanta, Georgia, and Fort Worth, Texas.[3] The petitioner, with counsel, appeared in connection with both indictments in the Federal District Court in Atlanta, Georgia on January 18, 1979.[4] Both indictments were before the court on a "change of plea motion".[5]

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[3] In May, 1978, petitioner was charged in a five (5) count indictment out of the U.S. District Court in Fort Worth, Texas, with a series of §2312 violations. Each of the five (5) counts involved a separate car (Cts. 1-3 . . Separate Lincoln Mark V cars, and Cts. 4-5 . . 2 separate Cadillacs). This indictment was brought to the trial judge in Atlanta, Georgia under Rule 20. The Atlanta indictment, CR 78-233A was returned in 12 counts as follows: Cts. 1-3, a Chevrolet Corvette under §2312 (Ct. 1), concealing the same car under §2313 (Ct. 2), and a false title for the same car under §2314 (Ct. 3). A Lincoln "Towncar" was pleaded in Cts. 4-6. Ct. 4 charged a §2312 violation, Ct. 5 a §2313, and Ct. 6 a §2314. Another Corvette was pleaded in Cts. 7-8. The §2312 was Ct. 7 and the §2313 was Ct. 8. Cts. 9-11 involved a Lincoln Mark V (Ct. 9, §2312); (Ct. 10, §2312); (Ct. 11, §2314). Ct. 12 charged a §2314 count which appears to be a duplicate of Count 11.

[4] The Fort Worth indictment appears at R. 1 in Record #79-5152. The Atlanta indictment is reproduced at R. 1 in Record #79-5151.

[5] 79-5151 (R. 19-20); 79-5152 (R. 20). See also Tr. 2-4; January 18, 1979.

The Rule 11 guilty plea colloquy as between the trial court and the petitioner is, in pertinent part, reproduced as follows:

"THE COURT: Are you thoroughly familiar with the nature and the consequences of a plea of guilty in these cases should I accept it?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept your plea of guilty you don't get a trial?

MR. CASTON: Right, I know it.

THE COURT: *You understand that you waive your presumption of innocence and all your constitutional protections, and all that you get is a sentence?*

MR. CASTON: Yes, sir.

THE COURT: You understand?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: And you understand that the maximum sentence I might impose on each count of these indictments is imprisonment of five years or a thousand dollars fine or both, on each of them?

MR. CASTON: Yes, sir.

THE COURT: And how many counts are there, all told? Six or seven?

MR. HIRSCH: Six on the indictment from here, Your Honor; and three on the other.

THE COURT: Nine Counts.

So that would be a total of forty-five thousand dollars or forty-five years maximum. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes.

THE COURT: Tell us a little bit about what happened.

MR. CASTON: Well, I don't know, some guys came down here with some cars and got caught with them and they said I helped them bring them down here, said I sent them down here.

THE COURT: Well, you're charged with transporting across state lines, or concealing?

MISS CARNES: Both, Your Honor.

MR. HIRSCH: Both, Your Honor.

MISS CARNES: Both.

THE COURT: *Well, did you know these cars were stolen?*

MR. CASTON: Yes, sir.

THE COURT: *And you did help them conceal them or transport them or dispose of them.*[6]

MR. CASTON: Yes.

THE COURT: So, you're guilty as charged?

MR. CASTON: Yes, sir." (Tr. 6-8; January 18, 1979).

The guilty plea of January 18, 1979 is accepted by the trial court and the parties reappeared for sentencing on February 16, 1979. Prior to the imposition of sentence, the court told the petitioner that if his guilty plea was accepted,[7] the petitioner would not get a trial, would not get to confront the witnesses against him and he would waive his presumption of innocence . . and surrender "ALL OF YOUR OTHER CONSTITUTIONAL PROTECTIONS" (February 16, 1979 at Tr. 15). Thereafter, the trial court sentenced petitioner as follows:

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[6] Clearly there is a difference as between §2312 and §2313. Petitioner agreed that he did help "conceal them or transport them or dispose of them". Thus, the "or" means that he was simply agreeing with the judge that one or the other was true. Rule 11 certainly compels a clearer factual basis than this (Cf., Rule 11(c)(3), (f)).

[7] The trial judge had already accepted the "change of plea" on January 18, 1979 (Tr. 8-10; January 18, 1979).

Atlanta Indictment, CR 79-233A.

Count 1 (Chevy Corvette) (§2312) . . five (5) years in custody.[8]

Count 2 (Chevy Corvette) (§2313) . . five (5) years in custody consecutive to Count 1.

Count 3 (Chevy Corvette) (§2314) . . dismissed after filing notice of appeal (R. 23, 79-5151).

Count 4 (Lincoln Towncar) (§2312) . . five (5) years in custody consecutive to Count 2.

Count 5 (Lincoln Towncar) (§2313) . . five (5) years in custody consecutive to Count 4.[9]

Count 6 (Lincoln Towncar) (§2314) . . dismissed after filing notice of appeal (R. 23, 79-5151).

Count 7 (Chevy Corvette) (§2312) . . five (5) years in custody consecutive to Count 5.[10]

Count 8 (Chevy Corvette) (§2313) . . dismissed after filing notice of appeal (R. 23, 79-5151).

Count 9 (Lincoln Mark V) (§2312) . . five (5) years in custody concurrent to Count 7.

Count 10 (Lincoln Mark V) (§2313) . . dismissed after filing notice of appeal (R. 23, 79-5151).

Count 11 (Lincoln Mark V) (§2314) . . dismissed after filing notice of appeal (R. 23, 79-5151).

Count 12 (Lincoln Mark V) (§2314) . . dismissed after filing notice of appeal (R. 23, 79-5151).

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[8] Thus . . 10 years in custody for stealing, interstate, a Chevy Corvette.

[9] Thus . . 10 years in custody for stealing, interstate, a Lincoln Towncar. Total 20 years for stealing two (2) cars!!

[10] Thus . . 25 years in custody for the interstate theft of three (3) cars.

Fort Worth Indictment, CR 4-78-83; Docketed in Atlanta as CR 79-04A.

Count 1 (Lincoln Mark V) (§2312) . . five (5) years in custody consecutive to Counts 7 and 9 of Indictment 78-233A.[11]

Count 2 (Lincoln Mark V) (§2312) . . five (5) years in custody concurrent with Count 1 of the Fort Worth, Texas, indictment.

Count 3 (Lincoln Mark V) (§2312) . . five (5) years in custody concurrent with Count 2 of the Fort Worth, Texas, indictment.

Counts 4 and 5 (Two (2) Cadillacs) (§2312) . . both Counts dismissed after notice of appeal filed (R. 25, #79-5152).

Petitioner is currently serving his thirty (30) year prison sentence.

REASONS FOR GRANTING THE PETITION

1. This case presents important and reoccurring questions within the scope of administering criminal justice in the federal courts. It has been noted that in 1978 over 85 percent of all federal convictions occurred on pleas of guilty or nolo contendere.[12] Notwithstanding that the district courts are beset with Rule 11 difficulties and pitfalls,

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[11] R. 23-25, #79-5152. Thus . . 30 years in custody for appropriating luxury cars, interstate.

[12] 1978 Annual Report of the Director, Administrative Office of the United States Court, 114.

this Court has offered, in recent years, only the following guidance:

> *"His only claim is of a technical violation of the rule. That claim could have been raised on direct appeal,* see, *McCarthy* v. *United States,* 394 U.S. 459 [89 S. Ct. 1166, 22 L.Ed.2d 418], *but was not".*[13]

2. The necessity for granting the petition now presented has recently been eschewed by many of the Circuit courts. For example, in *U.S.* v. *Dayton,* 604 F.2d 931 (CA 5, 1979 (*en banc*) a majority of the Circuit Judges opted for a Rule 11 theory suggesting that Rule 11 violations could and would not support "per se" reversals—while a minority of that court—took umbrage with the majority position as follows:

> *"Such an approach to constitutional or non-constitutional failure to comply with Rule 11 is diametrically contrary to McCarthy's holding that prejudice "inheres in a failure to comply with Rule 11." It is not meet for an inferior court to overrule Supreme Court precedent, and we disavow any part in this venture"* (604 F.2d at 950).

3. The lack of decisional certainty within the several Circuits will be addressed, *infra.*

4. The petitioner asserts as a separate ground for certiorari review that the "stacking or pyramiding" of the sentences is prohibited by the Fifth Amendment as interpreted by the Court in, inter alia, *Simpson* v. *U.S.,* 435 U.S. 6, 98 S.Ct. 909 (1978). In *Simpson,* the Court noted:

> "The Double Jeopardy Clause "protects against multiple punishment for the same offense," *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076,

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[13] *U.S.* v. *Timmreck,* 441 U.S. ..., 99 S.Ct. 2085 at 2087 (1979).

> 23 L.Ed.2d 656 (1969), and prohibits multiple prosecutions for the "same offense," *Jeffers* v. *United States,* 432 U.S. 137, 150-51, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977)" (98 S.Ct. at 912, n.5)".

Similarly, in *Sanabria* v. *U.S.,* 437 U.S. 54, 98 S.Ct. 2170 (1978), the Court precluded additional litigation finding that same was proscribed by the Double Jeopardy Clause. Justice Marshall noted:

> "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown* v. *Ohio, supra,* 432 U.S., at 169, 97 S.Ct. at 2227, or, as we hold today, into "discrete bases of liability" not defined as such by the legislature. See id., at 169 n. 8, 98 S.Ct. at 2227" (98 S.Ct. at 2183).

5. As the petitioner will point out, *infra,* the same "stacking" of counts as led to the thirty (30) years prison sentence in this case, is clearly neither the law of the land, nor the law of most of the Circuits. What the Court below approves in this case, was a *Carte-Blanche* approach to indictments wherein the prosecutor may freely isolate each event within a transaction and cause a separate charge or count to be pleaded . . thus exposing an accused to the possibility of "stacking" . . lest this Court provide relief.

6. In *Whalen* v. *U.S.,* ..... U.S. ....., 100 S.Ct. 1432 (1980) the court vacated the consecutive sentences for murder and rape finding the District of Columbia sentencing code to be violative of the Double Jeopardy Clause where consecutive sentences were imposed for what appears to be a lesser included offense (100 S.Ct. at 1438-1440) (Justices White and Blackmun, concurring). The petitioner claims similar sentencing improprieties as regarding 18 U.S.C. §2312 / §2313.

ARGUMENTS SUPPORTING THE GRANT OF CERTIORARI

I.

RULE 11 REVISITED

1. The record below shows that the petitioner was addressed by the trial court on January 18, 1979 . . at the time the guilty plea was accepted and on February 16, 1979 . . prior to the imposition to sentence. Petitioner was not told of his self-incrimination privilege were he to stand trial (Rule 11(c)(2)(3)) nor that on a trial, his attorney would have the right to summon witnesses on behalf of the petitioner. Additionally, but not by way of limitation, the rather sparse Rule 11 proceeding does not articulate anything whatsoever relative to proof beyond a reasonable doubt, the opportunity to have an unbiased jury, properly instructed, with the benefit of closing arguments by his own attorney to adjudicate guilty *vel non.* The *McCarthy* doctrine was not articulated by the Court to sanction a statement from the trial judge that Rule 11 is satisfied where the trial court tells the petitioner that he would be surrendering *"all of your other constitutional protections"* (January 18, 1979 at Tr. 6-8; February 16, 1979 at Tr. 15).

2. A "per se" approach to Rule 11 was the direction of this Court in *McCarthy* and *Timmreck* failed to alert us to the contrary. Some Circuit approaches yet yield a "per se" Rule 11 approach. Both the First Circuit [*U.S.* v. *Wazbeck,* 524 F.2d 641 (CA 1, 1975)] and the Second Circuit [*U.S.* v. *Journet,* 544 F.2d 633 (CA 2, 1976);

Alessi v. *U.S.*, 593 F.2d 476 (CA 2, 1979)], strictly construe *McCarthy* . . based on cases involving a direct appeal. The Third Circuit is none the different [*Horsley* v. *U.S.*, 583 F.2d 670 (CA 3, 1978)]. Both the Fifth and Seventh Circuits have recently relegated Rule 11 . . on direct appeal . . to something substantially less than the *McCarthy* "per se" approach.[14] The Ninth Circuit has recently found Rule 11 violations to be sufficiently covered by *McCarthy* so as to warrant vacation of a guilty plea before a Federal Magistrate, *U.S.* v. *Lopez-Beltram*, 607 F.2d 1223 at 1225 (CA 9, 1979). The synthesis of these decisions demonstrate the present decisional disarray within the Circuits.[15] This conflict, *aliunde*, supports the suggestion that certiorari is appropriate to resolve the present conflicts.[16]

3. The indictments below[17] show that in each of the counts in the Atlanta indictment petitioner was charged with both violations of §2312-§2315 and §2. The trial court certainly declined to take any opportunity to explain anything as regarding aiding and abetting . . although this Court has recently granted review to ascertain the parameters of liability under 18 U.S.C. §2.[18] We suggest there is an alarming confusion as regarding extended

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[14] *U.S.* v. *Dayton*, 604 F.2d 931 (CA 5, 1979 (*en banc*). (Cert. denied 100 S.Ct. 1080); *U.S.* v. *Gray*, 611 F.2d 194 (CA 7, 1979).

[15] We hasten to point out that the Fifth Circuit, pre-*Dayton*, was a "pure" "per se" Rule 11 Circuit, *U.S.* v. *Boatright*, 588 F.2d 471 (CA 5, 1978); *U.S.* v. *Hart*, 566 F.2d 977 (CA 5, 1978).

[16] The Sixth Circuit seems to have retained a "per se" approach as regarding Rule 11, *Phillips* v. *U.S.*, 519 F.2d 483 (CA 6, 1977). The Seventh Circuit reads *Phillips* with approval, *U.S.* v. *Gray*, 611 F.2d at 201-202 (CA 7, 1979).

[17] R. 1, #79-5151; and R. 2, #79-5152.

[18] Cf., *U.S.* v. *Standefer*, ... U.S. ..., 100 S.Ct. 658 (1980).

criminal liability, cf., *U.S.* v. *Pearlstein,* 576 F.2d 531 (CA 3, 1978), *U.S.* v. *Knife,* 592 F.2d 472 (CA 8, 1979). The transcriptional record, in this case, both January 18, 1979, and February 16, 1979 does not disclose any description as to whether or not the petitioner at all understood anything whatsoever to do with the extended liability considerations of 18 U.S.C. §2. Further, we point out, that both reasonable doubt and the right not to be "self-incriminated" at trial are "core" rights as are the right to have counsel at trial. These Rule 11 directives were not part of the transcripts below and these omissions . . under the facts of this litigation, bring this petition well beyond the bounds of "harmless error"—if that doctrine, is at all cognizable, on a direct-appeal, Rule 11 appeal.

4. Assuming *McCarthy* stands for per se reversal on the direct appeal from Rule 11 deficiencies, and assuming further, that *Timmreck* is applicable *only* to collateral attacks on Rule 11 deficiencies, then the petitioner must be granted relief. *Timmreck* said:

> "His only claim is of a technical violation of the Rule. That claim could have been raised on direct appeal, see *McCarthy* v. *U.S.,* (cite omitted), but was not" (411 U.S. at ....., 99 S.Ct. at 2087 (1979).)

Timmreck did not offer any insight into according *McCarthy* a prophylactic approach to Rule 11 deficiencies . . where the claims of error are presented on direct appeal.

II.

IMPERMISSIBLE CONSECUTIVE SENTENCING

Petitioner views his thirty (30) year sentence as constitutionally impermissible in that the trial court "stacked" or pyramided the units of punishment where the under-

lying events failed to warrant same.[19] Petitioner means that the sentencing was impermissible because the overall conduct was, in reality, but a single offense. This Court has condemned the segregating or separating of the offense . . into small temporal units . . for double jeopardy purposes, as follows:

> "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown* v. *Ohio, supra,* 432 U.S. at 169, 97 S.Ct. at 2227, or, as we hold today, into "discrete basis of liability" not defined as such by the legislature. See id., at 169 n. 8, 97 S.Ct. at 2227" (98 S.Ct. at 2183).[20]

In *Simpson* v. *U.S.,* 435 U.S. 6, 98 S.Ct. 909 (1978) the Court vacated a portion of the bank robbery sentence, same being enhanced because a deadly weapon was used in the commission of the bank robbery. The Court, while finding the consecutive sentence impermissible, noted:

> "The Double Jeopardy Clause "protects against multiple punishment for the same offense," *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), and prohibits multiple prosecutions for the "same offense," *Jeffers* v. *United States,* 432 U.S. 137, 150-151, 97 S.Ct. 2207, 2216, 53 L.Ed. 2d 168 (1977)" (98 S.Ct. at 912, n. 5).

The substance of petitioner's position is that there is simply no reason, within the parameters of this particular case, for the imposition of consecutive sentences. Assum-

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19 The factual basis for the §2313 counts are all but non-existent.

20 *Sanabria* v. *U.S.,* 437 U.S. 54, 98 S.Ct. 2170 (1978). In *Sanabria* the Court declined the government's invitation to continue the litigation after the trial court had erroneously entered a mid-trial judgment of acquittal.

ing, *arguendo,* that the petitioner stole and transported, from state to state, a luxury car . . then surely, the petitioner concealed the car that had previously been stolen. It is most unlikely that the petitioner put a sign on any of these luxury cars stating "that is a stolen car".[21] In addition, there remains little question that concealment is, or was, a lesser included offense thus proscribing consecutive punishment for a single act (transporting and concealing).

1. We reproduce hereafter some Circuit decisions *albeit* they relate to statutes other than 18 U.S.C. §2312-§2314. The Circuit decisions hereafter noted are based on precedents of this Court. In *U.S.* v. *Edick*, 603 F.2d 772 (CA 9, 1979) the Court declined to affirm the imposition of consecutive sentences for weapon violations under 26 U.S.C. §5861 (id. at 773). The Court concluded that the imposition of consecutive sentences for the single weapon violation impermissibly "pyramided" the punishment in that the multiple offenses arose from the same transaction (id. at 774). The Court found *Prince* v. *U.S.*, 352 U.S. 322, 77 S.Ct. 503 (1957) . . as dispositive authority. Within the realm of drug related offenses courts have likewise precluded the imposition of consecutive sentences where the same event or transaction gave rise to multiple [alleged] offenses. In *Goodson* v. *U.S.*, 564 F.2d 1071 (CA 4, 1977) the Court vacated the consecutive sentence for distribution of heroin where the evidence revealed that both the pos-

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[21] We must refer back to our Rule 11 deficiency argument, *ante.* There is simply nothing to support a *factual basis* for the §2313 counts for which the petitioner received consecutive sentences totalling twenty (20) years. In that the §2314 counts were dismissed we have no occasion to consider any factual basis argument as to those counts.

session and distribution were within the realm of a single transaction. The imposition of the consecutive sentence was proscribed by *Prince* v. *U.S., ante* (id. at 1073). More recently the Court of Appeals for the Fifth Circuit, *en banc,* came to a similar conclusion in *U.S.* v. *Hernandez,* 591 F.2d 1019 (CA 5, 1979) (*en banc*). That Court, relying on both *Bell* v. *U.S.,* 349 U.S. 81, 75 S.Ct. 620 (1955) and *Prince* v. *U.S., ante,* concluded that possession and distribution offenses under 21 U.S.C. §841(a)(1) could not sustain consecutive sentences where the same basic transaction gave rise to both the distribution and the possession offenses. The *Hernandez* Court pointed out that consecutive sentencing was proscribed by most Circuits and some Circuits even proscribed separate concurrent sentences (decisions cited at 591 F.2d 1021).[22]

The Circuit disarray as to the application of 18 U.S.C. App. §1202(a)(1) is found in *U.S.* v. *Bullock,* 615 F.2d 1082 (CA 5, 1980). In *Bullock* the Court affirmed consecutive sentences for the impermissible possession of certain firearms while pointing out that the Sixth, Seventh and Eighth Circuits do not allow consecutive sentencing for the simultaneous possession of separate firearms (id. at 1084).[23]

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[22] For the sake of brevity the Fourth and Ninth Circuits proscribe consecutive sentences while the Sixth and Tenth Circuits proscribe even separate concurrent sentences (591 F.2d at 1021, n. 4-8 . . collecting cases.

[23] The Sixth Circuit in *U.S.* v. *Rosenbarger,* 536 F.2d 715 (CA 6, 1976) held that there was a single offense under §1202(a)(1) regardless of the number of firearms involved. The Seventh Circuit in *U.S.* v. *Calhoun,* 510 F.2d 861 (CA 7, 1975) held that for sentencing purposes there was a single offense where two (2) firearms were charged. The Eighth Circuit, in *U.S.* v. *Kinsley,* 518 F.2d 665 (CA 8, 1976) came to the same conclusion where

(footnote continued on following page)

In *U.S.* v. *Seals,* 545 F.2d 26 (CA 7, 1979) the Court proscribed consecutive or cumulative sentencing, after a guilty plea, where the underlying offenses were charged under both 18 U.S.C. §1708 and 18 U.S.C. §2114. The Court found that possessing the same stolen mail that had been taken from the postal employee did not amount to the type of separate offense which could be the subject of cumulative punishment. The Seventh Circuit found as propositional authority the decisions in *Heflin* v. *U.S.,* 358 U.S. 415, 79 S.Ct. 451 (1959), *Milanovich* v. *U.S.,* 365 U.S. 551, 81 S.Ct. 728 (1961) and *U.S.* v. *Gaddis,* 424 U.S. 544, 96 S. Ct. 1028 (1976).[24] In *U.S.* v. *Stavros,* 597 F.2d 108 (CA 7, 1979) the Court remanded sentencing errors raised for the first time, on appeal (id. at 111). The Court found that it was impermissible to pyramid sentences for alleged violations of 26 U.S.C. §4401, §4412 and §7203. The Court's reasoning, while vacating certain of the sentences on double jeopardy grounds, is persuasive. The Court in *Stavros* stated:

> "While double jeopardy as prohibited by the Fifth Amendment is ordinarily thought of in terms of a second trial following either a conviction or acquittal in a first trial involving the same offense, there are certainly overtones of double jeopardy if a court ex-

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[23] *Continued*
four (4) different weapons were found. That Court proscribed consecutive sentences for the §1202(a)(1) offenses. The Fifth Circuit, in *Bullock, ante,* while affirming the consecutive sentences noted that the Circuit had not earlier directly ruled on the question of consecutive sentences in §1202 cases.

[24] In *Seals* a former member of this Court, Associate Justice Tom C. Clark participated, by designation. In *Heflin, ante,* Justice Clark concurred, 358 U.S. at 420; In *Milanovich,* Justice Clark dissented suggesting that the cure was in resentencing, not the grant of a new trial, 365 U.S. at 562-565. Petitioner suggests that the participation of Justice Clark in *Seals, ante,* demonstrates the thoughtful analysis included in the *Seals* opinion.

ceeds its legislative authorization by imposing multiple punishments for the same offense. See *Brown* v. *Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

If the same act or transaction violates two distinct statutes, then punishment for violation of both statutes violates the double jeopardy clause unless each offense requires proof of a fact not required by the other. *Simpson* v. *United States,* 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978); *Gore* v. *United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1958); *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *United States* v. *Mathis,* 579 F. 2d 415 (7th Cir., 1978).

It follows from the Supreme Court's longstanding test that punishment both for an offense and a lesser included offense violates double jeopardy. By definition, a lesser included offense contains some, but not all of the elements of the greater offense, and has no elements in addition to those of the greater offense. The offenses are therefore the same for the purpose of double jeopardy. See *Brown* v. *Ohio, supra,* 432 U.S. at 168, 97 S.Ct. 2221" (597 F.2d at 111-112).

2. As we understand the Court's decision in *U.S.* v. *Gaddis,* 424 U.S. 544 (1976) the petitioner at bar may have the benefit of the consecutive sentences vacated, and the cause remanded for resentencing, assuming, *arguendo,* that the Court declines to grant relief on the Rule 11 argument herein proffered.

CONCLUSION

The petitioner, Osban Caston, respectfully prays that the Court grant this Petition for Writ of Certiorari as to both questions and arguments presented and thereafter vacate the convictions and sentences and remand this matter for proceedings not inconsistent with the desired relief.[25]

Respectfully submitted,

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25 The petitioner, below, raised no realistic Eighth Amendment attack on the thirty (30) year prison sentence. The Court, of course, is welcome to consider that Argument by way of plain error, but we are aware of *Rummel* v. *Estelle*, ... U.S. ..., 100 S.Ct. 1133 (1980) (Justices Powell, Brennan, Marshall and Stevens, dissenting).

In *Whalen* v. *U.S.*, ... U.S. ..., 100 S.Ct. 1432 (1980) the Court vacated certain consecutive sentences while reviewing the parameters of Fifth Amendment protections . . in sentencing-double jeopardy situations. In reality the instant petition may present a strikingly similar situation.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Osban CASTON, Defendant-Appellant.

Nos. 79-5151, 79-5152.

United States Court of Appeals,
Fifth Circuit.

April 24, 1980.

Defendant pled guilty in the District Court for the Northern District of Georgia, Newell Edenfield, J., to charges of transporting stolen automobiles in interstate commerce and concealing and selling stolen automobiles and he appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) trial court's failure to explicitly mention to defendant in accepting his guilty plea that he had right to a jury, right to assistance of counsel at trial, right not to be forced to incriminate himself, and that his sworn answers to court's questions about his offenses could be admitted against him in a later perjury or false statement prosecution did not require reversal, where trial court ascertained that defendant elected to plead guilty without coercion, comprehended the charges against him, and understood the consequences of his plea, and (2) convictions for transporting in interstate commerce a stolen motor vehicle and for concealing and selling the same motor vehicle required proof of different sets of facts, and, therefore, consecutive sentences imposed by district judge were not barred by double jeopardy clause of the Fifth Amendment.

Affirmed.

1. Criminal Law—1166(3)

Trial court's failure to specifically mention to defendant in accepting his guilty plea that defendant had right to a

jury, right to assistance of counsel at trial, right not to be forced to incriminate himself or that his sworn answers to court's questions about his offenses could be admitted against him in a later perjury or false statement prosecution was harmless error and did not require reversal, where trial court ascertained that defendant elected to plead guilty without coercion, comprehended the charges against him, and understood the consequences of his plea. Fed.Rules Cr. Proc. Rule 11(c), 18 U.S.C.A.

2. Criminal Law—273.1(4)

While Constitution requires that in accepting defendant's guilty plea record indicate voluntariness of his waiver of rights of jury trial, confrontation, and non-self-incrimination, it does not require that the district judge go beyond such constitutional minima to ask specific questions that federal rule dealing with advice to be given to a defendant before accepting his guilty plea imposes as a prophylactic procedure. Fed.Rules Cr.Proc. Rules 11, 11(c)(3), 18 U.S.C.A.; U.S.C.A. Const. Amend. 5.

3. Criminal Law—1166(3)

District judges should scrupulously follow procedures under rule dealing with advice to be given to a defendant before accepting his guilty plea, but their occasional and lamentable shortcomings do not invoke automatic reversal if defendant's waiver of constitutional rights to trial by jury, to confrontation of his accusers, and against compulsory self-incrimination is shown to be voluntary and intelligent. Fed.Rules Cr.Proc. Rules 11, 11(c)(3), 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

4. Criminal Law—273.4(1)
Jury—29(6)

Defendant voluntarily and intelligently waived his jury trial and self-incrimination rights, although trial court did not in accepting his guilty plea inform him of his right to a jury, right to assistance of counsel at trial, right not to be forced to incriminate himself, or that his sworn answers to court's questions about his offenses could be ad-

mitted against him in a later perjury or false statement prosecution. Fed.Rules Cr.Proc. Rules 11, 11(c)(3, 5), 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

5. Criminal Law—273.1(4)

Rule requiring that in accepting defendant's guilty plea defendant be informed that his sworn answers to court's questions about his offenses may be admitted against him in a later perjury or false statement prosecution was added to assure fairness of a subsequent perjury prosecution, not the voluntariness of the plea. Fed. Rules Cr.Proc. Rule 11(c)(5), 18 U.S.C.A.

6. Criminal Law—1166(3)

Failure to inform defendant that his sworn answers to court's questions about his offenses may be admitted against him in a later perjury or false imprisonment prosecution does not mandate automatic reversal of guilty plea. Fed.Rules Cr.Proc. Rule 11(c)(5), 18 U.S.C.A.

7. Criminal Law—1166(3)

Where defendant was not being prosecuted for perjury and conceded that trial court's error in failing to advise him before accepting his guilty plea that his sworn answers to court's questions about his offenses could be admitted against him in a later perjury or false statement prosecution was not prejudicial, such error did not warrant reversal under harmless error standard. Fed.Rules Cr.Proc. Rule 11(c)(5), 18 U.S.C.A.

8. Criminal Law—1210

Cumulative punishment, consistent with double jeopardy clause, may be imposed for acts constituting violations of two separate statutory provisions, as long as each provision requires proof of an additional fact which the other does not. U.S.C.A.Const. Amend. 5.

9. Criminal Law—280(1)

Convictions for transporting in interstate commerce a stolen motor vehicle and for concealing and selling same motor vehicle required proof of different sets of facts, and,

therefore, consecutive sentences imposed by district judge for such convictions were not barred by double jeopardy clause of Fifth Amendment. 18 U.S.C.A. §§ 2312, 2313; U.S.C.A.Const. Amend. 5.

Russell Hirsch, Allan A. Ackerman, Chicago, Ill., for defendant-appellant in both cases.

Charles S. Saphos, Asst. U. S. Atty., Atlanta, Ga., for plaintiff-appellee in both cases.

Appeals from the United States District Court for the Northern District of Georgia.

Before VANCE, POLITZ and RANDALL, Circuit Judges.

VANCE, Circuit Judge:

Osban Caston, a professional car thief on parole for a prior offense, was indicted on May 31, 1978, in the Northern District of Texas and on September 5, 1978, in the Northern District of Georgia. In the Georgia indictment, Caston was charged with twelve counts of violating 18 U.S.C. §§ 2, 2312, 2313, and 2314 by transporting stolen automobiles in interstate commerce, causing stolen automobiles to be transported in interstate commerce, concealing and selling stolen automobiles, causing stolen automobiles to be concealed and sold, and knowingly causing counterfeited automobile certificates of title to be transported in interstate commerce. Similarly, the five-count Texas indictment charged Caston with causing stolen automobiles to be transported in interstate commerce in violation of 18 U.S.C. §§ 2 and 2312. In January 1979, the Texas case was transferred to the Northern District of Georgia under Fed.R.Crim.P. 20. A plea bargain agreement was negotiated. Caston, who had previously entered a plea of not guilty, then pleaded guilty to six counts of the Georgia indictment and three counts of the Texas indictment; the other counts were dismissed. The district judge sentenced Caston to five years confinement under each

count with some sentences running concurrently and some consecutively; the total sentence was 30 years.

Caston apparently did not like the way his plea bargain turned out, and he appealed his conviction to this court. He argues that his guilty plea should be set aside because in accepting his guilty plea, the district court did not comply fully with the requirements of Fed.R.Crim.P. 11. He next asserts that the consecutive sentences imposed by the district judge were barred by the double jeopardy clause of the fifth amendment. Although the first question is a close one, we affirm.

I.

Caston contends that the trial judge did not give him the advice or information required by Fed.R.Crim.P. 11 (c)(3) and 11(c)(5)[1] before accepting his guilty plea. The record[2] indicates that the trial court did not explicitly

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[1] Fed.R.Crim.P. 11(c) provides in pertinent part,

(a) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:

. . . . .

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

. . . . .

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

[2] On January 18, 1979, before the trial court accepted Caston's plea, the following exchange occurred:

(footnote continued on following page)

2 *Continued*

CLERK: Raise your right hand, sir.

Do you solemnly swear that the statements you shall make to the Court at this time shall be the truth, the whole truth and nothing but the truth, so help you God?

MR. CASTON: Yes, I do.

THE COURT: Mr. Caston, let me ask you a few questions. You are fully aware and familiar with the charges against you in both of these indictments?

MR. CASTON: Yes, sir.

THE COURT: Have you discussed them with your attorney, Mr. Hirsch?

MR. CASTON: Yes, sir.

. . . . .

THE COURT: And you want us to dispose of it here on this plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: Are you thoroughly familiar with the nature and consequences of a plea of guilty in these cases should I accept it?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept your plea of guilty you don't get a trial?

MR. CASTON: Right. I know it.

THE COURT: You understand that you waive your presumption of innocence and all your constitutional protections, and all that you get is a sentence?

MR. CASTON: Yes, sir.

THE COURT: You understand?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: And you understand that the maximum sentence I might impose on each count of these indictments is imprisonment of five years or a thousand dollars fine or both, on each of them?

MR. CASTON: Yes, sir.

THE COURT: And how many counts are there, all told? Six or seven?

MR. HIRSCH: Six on the indictment from here, Your Honor; and three on the other.

THE COURT: Nine counts.

(footnote continued on following page)

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2 *Continued*

So, that would be a total of forty-five thousand dollars or forty-five years maximum. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes.

THE COURT: Tell us a little bit about what happened.

MR. CASTON: Well, I don't know, some guys came down here with some cars and got caught with them and they said I helped bring them down here, said I sent them down here.

THE COURT: Well, you're charged with transporting across state lines, or concealing?

MISS CARNES: Both, Your Honor.

MR. HIRSCH: Both, Your Honor.

MISS CARNES: Both.

THE COURT: Well, did you know these cars were stolen?

MR. CASTON: Yes, sir.

THE COURT: And did you help them conceal them or transport them or dispose of them?

MR. CASTON: Yes.

THE COURT: So, you're guilty as charged?

MR. CASTON: Yes, sir.

The judge also questioned Caston during the February 16, 1979, sentencing procedures:

THE COURT: Are you thoroughly familiar with the nature of the charges pending against you?

MR. CASTON: Yes, sir.

THE COURT: There are nine counts here in two separate indictments of interstate transportation of stolen automobiles. You're familiar with that?

MR. CASTON: Yes, sir.

THE COURT: That's the ones you pled guilty to, and there's an agreement that some others are to be dropped?

MR. CASTON: Yes, sir.

THE COURT: Now, are you also thoroughly familiar with the nature and the consequences of a plea of guilty to these nine counts if I accept your plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: You know what the consequences and effect of that are?

MR. CASTON: Yes, sir.

(footnote continued on following page)

mention that Caston had the right to a jury, the right to the assistance of counsel at a trial, and the right not to be forced to incriminate himself at trial, disclosures required by Fed.R.Crim.P. 11(c)(3), or that his sworn answers to

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2 *Continued*

THE COURT: You understand that if I accept these pleas of guilty, you don't get a trial?

MR. CASTON: Yes, sir.

THE COURT: You do not get the right to confront the witnesses against you; you waive your presumption of innocence—

MR. CASTON: Yes, sir.

THE COURT: —and surrender all of your other constitutional protections?

In fact, all you get on a plea of guilty to these nine counts is a sentence on each one of them. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: Do you understand that the maximum penalty I might impose is five years in prison or five thousand dollars fine on each of these nine counts?

MR. CASTON: Yes, sir.

THE COURT: Well, now, and you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes, sir.

THE COURT: In all nine instances?

MR. CASTON: Yes, sir.

THE COURT: What were you in, an automobile theft ring of some sort, as charged, set out in the presentence report?

MR. CASTON: Yes, sir.

. . . . .

THE COURT: Has anybody promised you anything in the way of leniency or recommendations or anything of any character whatsoever—

MR. CASTON: No, sir.

THE COURT: —to cause you to enter these pleas?

MR. CASTON: No, sir.

THE COURT: Or tender these pleas?

MR. CASTON: No, sir.

THE COURT: Do you enter them freely and voluntarily, of your own free will and accord?

MR. CASTON: Yes, sir.

THE COURT: All right. I'll accept your plea of guilty to the nine counts involved.

the court's questions about his offenses could be admitted against him in a later perjury or false statement prosecution, a disclosure required by Rule 11(c)(5). Caston does not claim that he was prejudiced in any way by these omissions, but asserts that they are per se bases for reversal. In *United States v. Dayton,* 604 F.2d 931 (5th Cir. 1979) (en banc), however, this court held that not every violation of Rule 11 mandates automatic reversal.

The Supreme Court declared in *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), that "a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *Id.* at 463-64, 89 S.Ct. at 1169.[3] The 1966 version of Rule 11 in effect when *McCarthy* was decided was a relatively simple pronouncement containing less than one tenth as many words as the version we review today. *United States v. Dayton,* 604 F.2d at 936. In *Dayton* this court reasoned that the automatic reversal rule of *McCarthy* should be invoked when a trial court wholly fails to address any of the three core considerations embodied in the 1966 rule, lack of coercion, comprehension of the charge and knowledge of the plea's direct consequences, but that a harmless error standard, *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), applies to "inadequate addresses" of these three core inquiries or to unconnected "constitutional errors" that arise from Rule 11 proceedings. 604 F.2d at 939. We explained,

> We have held that the rule must be fully and faithfully followed, and we do not doubt that the district courts of this circuit will make all efforts to follow our mandate. The question here is not whether such efforts should be made but how we should appraise them when they are. Nothing from above requires us to view fallings off from post-*McCarthy* additions to

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[3] The court reached that result as a matter of statutory construction, not as a point of constitutional mandate. *Id.* at 464, 465, 89 S.Ct. at 1169, 1170.

> the rule as meriting automatic reversal, and we decline to do so. Where each of Rule 11's core inquiries has been reasonably implicated in the rule's required colloquy, we will examine its treatment to determine whether it has been sufficiently exposed to inquiry and determination. If so, we will not disturb the result. As for post-*McCarthy* additions to the rule—many, if not all, of which require determinations of fact that can scarcely be described as ultimate—nothing would prevent the trial court from making each the subject of a factfinding. Should it do so, we would review them in accordance with the clearly erroneous rule and that of harmless error, as in the case of any other finding by a trial judge sitting in a criminal case where a jury has been waived.

Id. at 940.

[1-4] We reject Caston's contention that the Rule 11 (c)(3) omissions require reversal. The district judge adequately addressed the three core considerations of Rule 11 under *McCarthy*. He asked numerous questions about whether Caston had elected without coercion to plead guilty and whether he comprehended the charges against him. The judge asked Caston if he understood that by pleading guilty he waived his right to a trial, his presumption of innocence, his right to confront the witnesses against him, and all his constitutional rights. He told Caston that he would not get a trial, only a sentence, and described the maximum possible penalties for the offenses. He repeatedly gained assurance that Caston was familiar with the nature and consequences of a guilty plea. *See* note 2 *supra*. Caston had changed his original plea of not guilty to a guilty plea pursuant to a plea bargain agreement. He was an experienced defendant and was actively represented by counsel during the plea proceedings. We are convinced from the record that Caston understood his alternatives and the rights he was waiving. *Cf. Kloner v. United States*, 535 F.2d 730, 733-34 (2d Cir.), *cert. denied*, 429 U.S. 942, 97 S.Ct. 361, 50 L.Ed.2d 312 (1976) (relief sought under 28 U.S.C. § 2255). *See generally North Carolina v. Alford*,

400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *Wilkins v. Erickson*, 505 F.2d 761, 763-64 (9th Cir. 1974); *United States v. Sherman*, 474 F.2d 303, 305 (9th Cir. 1973). Although the trial judge did not comply adequately with Rule 11(c)(3), we find that he did sufficiently determine that Caston understood the direct consequences of his plea including his waiver of certain constitutional rights. *See United States v. Dayton*, 604 F.2d at 942-43.[4] Caston

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[4] The Supreme Court held in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), that, for a guilty plea to be voluntary, waiver of a defendant's constitutional rights to trial by jury, to confrontation of his accusers, and against compulsory self-incrimination must be disclosed by the record and cannot be presumed "from a silent record." *Id.* at 243-44, 89 S. Ct. at 1712-13. The court did not say, however, that waiver must affirmatively appear as long as the record is not silent. *See Summers v. United States*, 538 F.2d 1208, 1209-10 & n. 1 (5th Cir. 1976); *United States v. Frontero*, 452 F.2d 406, 415 (5th Cir. 1971). It found on the facts of that case that "there was reversible error 'because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.' " *Id.* 395 U.S. at 244, 89 S.Ct. at 1713 (quoting *Boykin v. Alabama*, 281 Ala. 659, 663, 207 So.2d 412, 415 (1968) (dissenting opinion)). While the Constitution thus requires that the record indicate the voluntariness of any waiver of these three rights of jury trial, confrontation, and non-self-incrimination, it does not require that the district judge go beyond these "constitutional minima," *United States v. Dayton*, 604 F.2d at 935 n.2, to ask the specific questions that Rule 11(c)(3) imposes as a prophylactic procedure. A defendant's waiver of those three rights very well might be voluntary and intelligent without compliance with the prophylactic safeguard of Rule 11(c)(3). *Boykin* requires reversal if the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty, but not if the record discloses voluntary and intelligent waiver without the prophylactic questions under Rule 11(c)(3). District judges should scrupulously follow the procedures under Rule 11(c)(3), but their occasional and lamentable shortcomings do not invoke the automatic reversal rule of *Boykin* if the defendant's waiver is nevertheless shown to be voluntary and intelligent.

Caston does not contend that he was unaware of his rights to jury trial, to confrontation, against self-incrimination, and to

(footnote continued on following page)

does not claim that he was injured by the court's failure to comply with Rule 11(c)(3); therefore, the error was harmless beyond a reasonable doubt and does not merit reversal. *See Chapman v. California,* 386 U.S. at 21-22, 87 S.Ct. at 826-27.

[5-7] We also reject Caston's argument that the Rule (c)(5) omission demands reversal. Although his point is clearly supported by our panel holding in *United States v. Boatright,* 588 F.2d 471, 475 (5th Cir. 1979), the automatic reversal requirement in *Boatriyht* is no longer viable in the wake of our en banc decision in *Dayton. See* 604 F. 2d at 941. Rule 11(c)(5) was added in 1975 to assure the fairness of a subsequent perjury prosecution, not the voluntariness of the plea. *United States v. Conrad,* 598 F.2d 506, 508-09 (9th Cir. 1979); *United States v. White,* 572 F. 2d 1007, 1009 n.4 (4th Cir. 1978). Because it is not one of the core inquiries under Rule 11, its omission does not mandate automatic reversal. *United States v. Conrad,* 598 F.2d at 509; *see United States v. Dayton,* 604 F.2d at 939-40. Caston is not being prosecuted for perjury and con-

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4 *Continued*
counsel. He does not suggest that he was unaware that a guilty plea necessarily waived those rights. The district judge asked whether Caston understood that "you don't get a trial" and "[y]ou do not get the right to confront the witnesses against you," *see* note 2 *supra*; Caston obviously understood that he had the right to the assistance of counsel. The judge also asked whether Caston knew the language of pre-*McCarthy* Rule 11, and whether he "underst[oo]d that you waive . . . all your constitutional protections." *See id.* The Supreme Court said in *McCarthy,* "The nature of the inquiry required by Rule 11 must necessarily vary from case to case . . . ." 394 U.S. at 467, 89 S.Ct. at 1171. In light of the circumstances of this case, we believe that the record indicates that Caston voluntarily and intelligently waived his jury trial and self-incrimination rights, although the court below did not comply fully with Rule 11(c)(3). *See Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L. Ed.2d 747 (1970) (guity plea entered in 1959 voluntary and intelligent even though defendant not specifically advised of *Boykin* rights).

cedes that the error was not prejudicial; so it does not warrant reversal under the harmless error standard. *See Chapman v. California,* 386 U.S. at 21-22, 87 S.Ct. at 826-27.

II.

Caston also contends that his consecutive sentences under counts 1 and 2 and counts 4 and 5 of the Georgia indictment violate the double jeopardy clause of the fifth amendment. In Count 1 he was charged with transporting a Chevrolet Corvette from Illinois to Atlanta in violation of 18 U.S.C. § 2312, and in Count 2, with concealing, bartering, selling and disposing of the same automobile in violation of *id.* § 2313. In Count 4 he was similarly charged with transporting a particular Lincoln Town Car from Chicago to Atlanta in violation of section 2312, and in Count 5, with concealing, bartering, selling and disposing of the same vehicle in violation of section 2313. Caston relies on our holdings in *United States v. Hernandez,* 591 F. 2d 1019 (5th Cir. 1979) (en banc), and in *United States v. Casey,* 540 F.2d 811 (5th Cir. 1976), to support his double jeopardy argument based on alleged double punishment for the same offense. Neither *Hernandez* nor *Casey,* however, indicates that the fifth amendment bars the consecutive sentences imposed in this case.

Hernandez revolved around the legislative intent behind a different statute. The defendant was convicted both of possession with intent to distribute and distribution of heroin in violation of the same subsection of 21 U.S.C. § 841 (a)(1). All of the evidence against Hernandez arose from a single transaction in which Hernandez sold heroin to two undercover agents. We held that, in enacting that single provision containing alternative phrases, Congress did not intend to make a single delivery of narcotics punishable as two separate offenses. "When the intent to distribute was executed by a successful sale, the possession with intent to do so merged into the completed offense." 591 F.2d at 1022. In his opinion for the court en banc, Judge Rubin expressly stated that the issue was narrow and that the court

decided no more than was necessary to carry out congressional intent in the specific circumstances of the case. *Id.*

Casey dealt with the specific sections before us and the interstate transportation of a single stolen vehicle. The case provides no support for Caston, however, because the court simply held that the evidence did not prove the section 2312 violation. 540 F.2d at 815 n. 8. It cannot be read even to imply that Casey could not also have been convicted and sentenced under that section if the government proved that he concealed the stolen automobile as charged.

[8, 9] Cumulative punishment, consistent with the double jeopardy clause, may be imposed for acts constituting violations of two separate statutory provisions, as long as "each provision requires proof of an additional fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). *Accord, Simpson v. United States,* 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Brown v. Ohio,* 432 U.S. 161, 166, 97 S.Ct. 221, 2225, 53 L.Ed.2d 187 (1977). A conviction for transporting in interstate commerce a stolen motor vehicle in violation of section 2312 and one for concealing and selling the same motor vehicle in violation of section 2313 clearly require proof of different sets of facts. This court has consistently held that defendants may be convicted of violating both statutes with the same vehicle and sentenced consecutively. *See United States v. Marvel,* 493 F. 2d 15, 16 (5th Cir. 1974); *United States v. Stone,* 411 F.2d 597, 599 (5th Cir. 1969); *Strother v. United States,* 387 F. 2d 385, 386 (5th Cir. 1967), *cert. denied,* 391 U.S. 971, 88 S.Ct. 2038, 20 L.Ed.2d 886 (1968). The consecutive sentences imposed by the district judge in this case thus were not barred by the double jeopardy clause of the fifth amendment.

AFFIRMED.

Supreme Court, U.S.
FILED
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No. 79-1858

In the Supreme Court of the United States

OCTOBER TERM, 1979

OSBAN CASTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner is entitled to vacation of his guilty plea because of defects in the plea proceeding.

2. Whether consecutive sentences may be imposed for transporting a stolen motor vehicle in interstate commerce, in violation of 18 U.S.C. 2312, and for concealing, bartering, selling or disposing of the same vehicle, in violation of 18 U.S.C. 2313.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 615 F. 2d 1111.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1980. The petition for a writ of certiorari was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is "a professional car thief" (Pet. App. 4a). While on parole, he became involved in a scheme in which cars that had been stolen in the Chicago area were transported and sold in Georgia and Texas. Petitioner was subsequently charged under 18 U.S.C. 2312-2314 in a 12-count indictment in the United States District Court for the Northern District of Georgia and in a five-count indictment in the United States District Court for the Northern District of Texas. After the Texas case was transferred to the Northern District of Georgia (see Fed. R. Crim. P. 20), petitioner pleaded guilty, pursuant to a plea agreement, to seven counts of interstate transportation of stolen motor vehicles, in violation of 18 U.S.C. 2312, and two counts of concealing or disposing of stolen motor vehicles, in violation of 18 U.S.C. 2313; the remaining counts were dismissed in accordance with the agreement. Petitioner was sentenced to a total term of 30 years' imprisonment (Pet. App. 4a-5a).

Apparently dissatisfied with "the way his plea bargain turned out" (Pet. App. 5a), petitioner appealed his conviction. The court of appeals affirmed (Pet. App. 1a-14a), rejecting petitioner's contentions that his guilty plea should be vacated because of defects in the plea proceeding under Fed. R. Crim. P. 11 and that

consecutive sentences were improperly imposed for interstate transportation of a stolen vehicle (18 U.S.C. 2312) and sale or concealment of the same vehicle (18 U.S.C. 2313).

2. At the Rule 11 hearing, the district court personally addressed petitioner as follows (Pet. App. 6a-7a n.2):

THE COURT: Mr. Caston, let me ask you a few questions. You are fully aware and familiar with the charges against you in both of these indictments?

MR. CASTON: Yes, sir.

THE COURT: Have you discussed them with your attorney, Mr. Hirsch?

MR. CASTON: Yes, sir.

* * * * *

THE COURT: And you want us to dispose of it here on this plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: Are you thoroughly familiar with the nature and consequences of a plea of guilty in these cases should I accept it?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept your plea of guilty you don't get a trial?

MR. CASTON: Right. I know it.

THE COURT: You understand that you waive your presumption of innocence and all your constitutional protections, and all that you get is a sentence?

MR. CASTON: Yes, sir.

THE COURT: You understand?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: And you understand that the maximum sentence I might impose on each count of these indictments is imprisonment of five years or a thousand dollars fine or both, on each of them?

MR. CASTON: Yes, sir.

THE COURT: And how many counts are there, all told? Six or seven?

MR. HIRSCH: Six on the indictment from here, Your Honor; and three on the other.

THE COURT: Nine counts.

So, that would be a total of forty-five thousand dollars or forty-five years maximum. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: And you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes.

THE COURT: Tell us a little bit about what happened.

MR. CASTON: Well, I don't know, some guys came down here with some cars and got caught with them and they said I helped bring them down here, said I sent them down here.

THE COURT: Well, you're charged with transporting across state lines, or concealing?

MISS CARNES: Both, Your Honor.

MR. HIRSCH: Both, Your Honor.

MISS CARNES: Both.

THE COURT: Well, did you know these cars were stolen?

MR. CASTON: Yes, sir.

THE COURT: And did you help them conceal them or transport them or dispose of them?

MR. CASTON: Yes.

THE COURT: So, you're guilty as charged?

MR. CASTON: Yes, sir.

Similarly, before passing sentence, the district court again questioned petitioner (Pet. App. 7a-8a n.2):

THE COURT: Are you thoroughly familiar with the nature of the charges pending against you?

MR. CASTON: Yes, sir.

THE COURT: There are nine counts here in two separate indictments of interstate transportation of stolen automobiles. You're familiar with that?

MR. CASTON: Yes, sir.

THE COURT: That's the ones you pled guilty to, and there's an agreement that some others are to be dropped?

MR. CASTON: Yes, sir.

THE COURT: Now, are you also thoroughly familiar with the nature and the consequences of a plea of guilty to these nine counts if I accept your plea of guilty?

MR. CASTON: Yes, sir.

THE COURT: You know what the consequences and effect of that are?

MR. CASTON: Yes, sir.

THE COURT: You understand that if I accept these pleas of guilty, you don't get a trial?

MR. CASTON: Yes, sir.

THE COURT: You do not get the right to confront the witnesses against you; you waive your presumption of innocence—

MR. CASTON: Yes, sir.

THE COURT: —and surrender all of your other constitutional protections?

In fact, all you get on a plea of guilty to these nine counts is a sentence on each one of them. Do you understand that?

MR. CASTON: Yes, sir.

THE COURT: Do you understand that the maximum penalty I might impose is five years in prison or five thousand dollars fine on each of these nine counts?

MR. CASTON: Yes, sir.

THE COURT: Well, now, and you still wish to plead guilty?

MR. CASTON: Yes, sir.

THE COURT: Well, are you in fact guilty?

MR. CASTON: Yes, sir.

THE COURT: In all nine instances?

MR. CASTON: Yes, sir.

THE COURT: What were you in, an automobile theft ring of some sort, as charged, set out in the presentence report?

MR. CASTON: Yes, sir.

* * * * *

THE COURT: Has anybody promised you anything in the way of leniency or recommendations or anything of any character whatsoever—

MR. CASTON: No, sir.

THE COURT: —to cause you to enter these pleas?

MR. CASTON: No, sir.

THE COURT: Or tender these pleas?

MR. CASTON: No, sir.

THE COURT: Do you enter them freely and voluntarily, of your own free will and accord?

MR. CASTON: Yes, sir.

THE COURT: All right. I'll accept your plea of guilty to the nine counts involved.

ARGUMENT

1. Although not claiming that his guilty plea was constitutionally invalid, petitioner asserts that his plea should be vacated because the district court failed to

comply with the requirements of Fed. R. Crim. P. 11.[1] Petitioner argues for a *per se* rule of reversal for Rule 11 violations even where, as here, there is no allegation that a defendant's substantial rights were prejudicially affected or that his decision to plead guilty might have been altered by punctilious compliance with the Rule.

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[1]The present version of Fed. R. Crim. P. 11 provides in pertinent part:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
>
> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also

a. Without citation to the specific provisions of Rule 11, petitioner first complains (Pet. 16) that the district court failed to advise him about "his attorney['s] * * * right to summon witnesses on [his] behalf" at trial or about "proof beyond a reasonable doubt [and] the opportunity to have an unbiased jury, properly instructed, with the benefit of closing arguments by his own attorney to adjudicate guilty [*sic*] *vel non*." However, Rule 11 nowhere provides that such advice be given.[2] Petitioner has offered no reason or authority to support the establishment of these additional prerequisites that are not required by either Rule 11 or the Constitution.

b. Petitioner next argues (Pet. 17-18) that he was not fully informed of "the nature of the charge to which the plea [was] offered" (Fed. R. Crim. P. 11(c)(1)) because the district court failed to explain the aiding and abetting statute (18 U.S.C. 2). However, aiding and abetting is not itself a separate substantive offense, and indeed it need not be charged in the indictment in order to convict an accessory as a principal. See, *e.g.*, *United States* v. *Maselli*, 534 F. 2d 1197, 1200 (6th Cir. 1976); *United*

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inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

* * * * *

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[2]The Advisory Committee's Notes on the 1974 amendments to Rule 11 state that "a defendant's right to have his guilt proved beyond a reasonable doubt * * * [is] best explained by indicating that the right to trial is waived. * * * In explaining to a defendant that he waives his right to trial, the judge *may want to explain* some of the aspects of trial such as the right * * * to subpoena witnesses * * *" (emphasis added).

States v. *Taylor*, 464 F. 2d 240, 242 n.1 (2d Cir. 1972); *United States* v. *Sannicandro*, 434 F. 2d 321, 324 (9th Cir. 1970); *United States* v. *Lugo-Baez*, 412 F. 2d 435, 440 (8th Cir. 1969), cert. denied, 397 U.S. 966 (1970). Accordingly, Rule 11(c)(1) does not require the district court to engage in a detailed explanation of the aiding and abetting statute during the plea hearing.

In the instant case, the court determined that petitioner understood the charges against him, that petitioner had been involved in "an automobile theft ring[,]" and that petitioner had "helped" conceal, transport, and dispose of cars that he knew were stolen (see pages 2-6, *supra*). In addition, the court correctly advised petitioner of the maximum penalty provided by law on each count. This procedure adequately apprised petitioner of the nature of the charges to which his plea was offered and the penal personal consequences of the plea.

c. Petitioner lastly contends (Pet. 16-18) that his guilty plea should be vacated on the ground that the district court failed to advise him of "the right not to be compelled to incriminate himself" at trial (Fed. R. Crim. P. 11(c)(3)). While we agree that the court deviated from Rule 11 in this regard, we do not believe that vacation of petitioner's plea is warranted.

As the court of appeals described (Pet. 10a), the district court substantially complied with the requirements of Rule 11. Petitioner raises no claim that his plea was constitutionally defective because it was not voluntarily and intelligently made. Nor does petitioner—"an experienced defendant * * * who was actively represented by counsel during the plea proceedings" (*ibid.*)—allege that he was prejudiced by this departure from Rule 11; indeed, he "does not contend that he was unaware of his right[] * * * against self-incrimination * * * [and he] does

not suggest that he was unaware that a guilty plea necessarily waived [that] right[]" (*id.* at 11a-12a n.4). In these circumstances, the court of appeals properly concluded (*id.* at 12a) that this failure to comply with Rule 11 "was harmless beyond a reasonable doubt and does not merit reversal" even under the strict harmless-error standard of *Chapman* v. *California,* 386 U.S. 18, 21-22 (1967).

Petitioner asserts, however, that all Rule 11 violations are *per se* reversible error. In our view, neither Rule 11 itself nor the Court's decision in *McCarthy* v. *United States,* 394 U.S. 459 (1969), requires that the Rule barring reversal for harmless error (Fed. R. Crim. P. 52(a)) be inapplicable to plea proceedings or that a technical, non-prejudicial violation of the current version of Rule 11 necessitates the automatic reversal on direct appeal of a guilty plea that is voluntary, intelligent, and factually accurate. In *McCarthy,* the Court invoked its supervisory powers to hold that a guilty plea would automatically be invalidated on direct appeal if the district court had acted "without fully adhering to the procedure provided for in Rule 11" (394 U.S. at 464).[3] *McCarthy* was "based solely upon * * * [a] construction of Rule 11" (*ibid.*), a provision that was substantially amended in 1974 to its present form (see note 1, *supra*).[4] See also *Halliday* v. *United States,* 394 U.S. 831, 832 (1969) ("*McCarthy* * * *

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[3]In *United States* v. *Timmreck,* 441 U.S. 780 (1979), the Court held that a technical, non-prejudicial violation of Rule 11 would not support a collateral attack on a guilty plea.

[4]At the time of the *McCarthy* decision, Rule 11 read as follows:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding

took care to note that our holding was based solely upon the application of Rule 11 and not upon constitutional grounds"). Under the revised, more detailed version of Rule 11, we submit that automatic reversal is inappropriate where a district court inadvertently commits a formal, non-prejudicial error in a plea proceeding.

The courts of appeals are divided on the question whether a technical violation of amended Rule 11 that does not affect the defendant's substantial rights necessarily requires reversal of a guilty plea on direct appeal.[5] Nevertheless, this Court has recently declined to review the issue. See *United States* v. *Gray*, 611 F. 2d 194

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of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[5]The Fifth, Eighth and Ninth Circuits have not adopted a standard of automatic reversal. See *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Cammisano*, 599 F. 2d 851, 855 (8th Cir. 1979); *United States* v. *Scharf*, 551 F. 2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F. 2d 962 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977); *United States* v. *Conrad*, 598 F. 2d 506 (9th Cir. 1979). On the other hand, some circuits have imposed an "automatic reversal" rule. See *United States* v. *Gray*, 611 F. 2d 194 (7th Cir. 1979), cert. denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Fels*, 599 F. 2d 142, 149 n.5 (7th Cir. 1979); *United States* v. *White*, 583 F. 2d 819, 824 (6th Cir. 1978); *United States* v. *Boone*, 543 F. 2d 1090, 1092 (4th Cir. 1976). The Second Circuit has taken conflicting positions on the issue. Compare *United States* v. *Michaelson*, 552 F. 2d 472 (2d Cir. 1977), and *United States* v. *Saft*, 558 F. 2d 1073 (2d Cir. 1977), with *United States* v. *Palter*, 575 F. 2d 1050 (2d Cir. 1978), and *United States* v. *Journet*, 544 F. 2d 633, 635 (2d Cir. 1976). The Third Circuit, sitting en banc, recently considered the issue, but was evenly divided and affirmed without opinion. *United States* v. *Altro*, 612 F. 2d 575 (3d Cir. 1979) (table), cert. denied, No. 79-5892 (Mar. 17, 1980); see also

(7th Cir. 1979), cert. denied, No. 79-6057 (Apr. 21, 1980); *United States* v. *Dayton*, 604 F. 2d 931 (5th Cir. 1979) (en banc), cert. denied, No. 79-944 (Feb. 25, 1980); *United States* v. *Altro*, 612 F. 2d 575 (3d Cir. 1979) (en banc) (table), cert. denied, No. 79-5892 (Mar. 17, 1980). Moreover, the conflict may be resolved in the near future by a proposed amendment to Rule 11:

> (*h*) *HARMLESS ERROR.* Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 85 F.R.D. 379, 387 (1979).[6] In November 1979, the proposed amendment was circulated for comment by the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (*id.* at 382-383). If adopted, this amendment would resolve the conflict, and the question presented in the petition would no longer be of continuing public importance. Accordingly, we do not believe there is any need for the Court to review the issue at this time.

2. Petitioner also claims (Pet. 18-23) that it violated double jeopardy to impose consecutive sentences for the interstate transportation of a stolen vehicle (18 U.S.C.

United States v. *Carter*, 619 F. 2d 293, 294, 295 n.9, 299 (3d Cir. 1980). Previously, the Third Circuit had followed the "automatic reversal" rule. See *United States* v. *Keller*, 594 F. 2d 939, 942 (3d Cir. 1979); but see *United States* v. *Dawkins*, 448 F. Supp. 1343 (E.D. Pa.), aff'd, 577 F. 2d 729 (3d Cir. 1978) (table).

[6]The Advisory Committee's Note indicates that proposed Rule 11(h) is a clarifying amendment and that a harmless-error standard is appropriate under the existing Rule. See 85 F.R.D. at 397, 400.

2312) and the concealment, sale or disposition of the same vehicle (18 U.S.C. 2313).[7] The court of appeals correctly rejected this contention (Pet. App. 13a-14a).

Petitioner's assertion rests on his view that "the overall conduct was, in reality, but a single offense" (Pet. 19). Even accepting petitioner's characterization of the underlying course of conduct, however, the imposition of consecutive sentences does not offend the Double Jeopardy Clause. See, *e.g., Gore* v. *United States,* 357 U.S. 386 (1958). "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. * * * The dispositive question, therefore, is whether Congress did * * * provide [for cumulative punishments]." *Whalen* v. *United States,* No. 78-5471 (Apr. 16, 1980), slip op. 3-4. See also *Busic* v. *United States,* No. 78-6020 (May 19, 1980), slip op. 2 (Blackmun, J., concurring).

In *Blockburger* v. *United States,* 284 U.S. 299 (1932), the Court set forth the general standard "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively * * * [:] 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied * * * is whether each provision requires proof of a fact which the other does not' " (*Whalen* v. *United States, supra,* slip op. 7, quoting 284 U.S. at 304). Here, it is manifest that Sections 2312 and 2313 each entail proof of distinct facts. Under Section 2312, the government

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[7]Petitioner received consecutive five-year sentences both on counts one and two of the Georgia indictment (involving a 1977 Chevrolet Corvette) and on counts four and five of that indictment (pertaining to a 1977 Lincoln Town Car).

must establish that the defendant transported the vehicle in interstate commerce, while Section 2313 does not prescribe such proof of the defendant's participation; on the other hand, an element of Section 2313, but not of Section 2312, is that the defendant conceal, sell or dispose of the stolen vehicle. In line with this analysis, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar cumulative punishments pursuant to Sections 2312 and 2313. See, *e.g.*, *United States* v. *Sanders*, 538 F. 2d 695 (5th Cir.), cert. denied, 429 U.S. 985 (1976); *United States* v. *Neighbors*, 515 F. 2d 796, 797 (8th Cir. 1975); *United States* v. *Ploof*, 464 F. 2d 116, 119-120 (2d Cir.), cert. denied, 409 U.S. 952 (1972); *United States* v. *Thompson*, 442 F. 2d 1333, 1334 (6th Cir. 1971); *United States* v. *Lankford*, 296 F. 2d 34, 36 (4th Cir. 1961); *Woody* v. *United States*, 258 F. 2d 535, 536 (6th Cir. 1957), aff'd per curiam by an equally divided Court, 359 U.S. 118 (1959); *Madsen* v. *United States*, 165 F. 2d 507, 510 (10th Cir. 1947).[8]

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[8]Petitioner has pointed to nothing in the language, purpose or history of Sections 2312 and 2313 to suggest that, notwithstanding the fact that the *Blockburger* test is satisfied, Congress intended not to authorize cumulative punishments. See *Whalen* v. *United States*, *supra*, slip op. 7. To the contrary, as noted above, the courts of appeals have unanimously concluded that the statutes permit consecutive sentences to be imposed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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